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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1959.

No. 346.

MRS. GLADYS LEITH HOLMES,
Petitioner,

vs.

CONTINENTAL CASUALTY COMPANY et al.,
Respondents.

SUPPLEMENTAL BRIEF

Of Respondent, Continental Casualty Company,
In Opposition.

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I.

Some of the confusion presented by this case can be clarified if we are successful in pointing out that the petitioner ignores the fact that the Court of Appeals followed the standard set by the law of Alabama in determining whether the agent had authority to make the oral contract relied upon, and, after determining the agent did not have such authority, followed the procedure provided for by Rule 50 (b).

The reply filed in behalf of petitioner indicates that petitioner is not willing to admit, in clear and unequivocal language, that the basic question presented is not whether the Court of Appeals applied the wrong "test" in determining whether the District Court erred in refusing respondent's (defendant's) motion for a directed verdict, but whether the Court of Appeals had authority to order the entry of a judgment for respondent, after reaching the conclusion that, as a matter of law, such a judgment should have been entered at the conclusion of the trial in the District Court.

In the petitioner's reply, it is stated that the respondent concedes that the Court of Appeals "rejected the state test and applied a 'federal one' ". This is a distortion of a statement appearing in the first paragraph on page 15 of respondent's initial brief in opposition, by which respondent was undertaking to point out that the questions presented in the Petition were not raised in the lower court. The respondent says that the Court of Appeals, in considering the two questions raised under specifications of error 1 and 2 (based upon the refusal of the District Court to grant the motion for directed verdict and upon the refusal of the District Court to grant the motion for judgment notwithstanding the verdict) did that which is done uniformly by all of the circuit courts, and did that which the Supreme Court of Alabama would have done if it had been called upon to determine whether the verdict should be permitted to stand. In such event the Supreme Court of Alabama would not have applied the scintilla rule but would have reversed and remanded if it had found, as did the Court of Appeals, that there was no substantial basis for the verdict.

Where the question arises as to whether the plaintiff has presented sufficient evidence to sustain the cause of action alleged, or where the question is raised as to

whether the defendant has established a defense which is relied upon to defeat the action, the courts look to that law which governs the rights and duties of the parties. In this case the District Court and the Court of Appeals followed the law of Alabama in respect to the burden of proof and the test by which to measure the authority of the agent. The Court of Appeals, after concluding that the District Court should have directed a verdict for the defendant, was not required to determine whether Alabama procedure would permit the direction of a verdict, or whether under Alabama procedure a new trial would have to be ordered. It is on this point that the respondent differs with the petitioner.

The respondent says that the Court of Appeals followed the mandate of **Erie v. Tompkins**, 304 U. S. 64, insofar as the state law bore upon the questions presented, as is indicated by the various references to Alabama case law. Certainly, it cannot successfully be contended that the Erie case overruled **Herron v. Southern Pacific Company**, 283 U. S. 91, or that the Erie case changed the rule relating to the respective functions of judge and jury in the trial of cases in the Federal Courts.

We trust the foregoing is sufficient to emphasize the importance of not confusing the action of the Court of Appeals in determining whether the verdict of the jury should be permitted to stand with the action of the Court in directing the District Court to enter a judgment for the defendant.

II.

Petitioner admits that there is no diversity of opinion in the Fifth and Fourth Circuits regarding the rejection of the scintilla rule, but says that "they do it because they are among the Circuits which insist that the sufficiency of the evidence is determined by a federal rather than a

state standard. They have not carved out a special rule under which the scintilla test is ignored."

We respectfully differ with the foregoing statement of the petitioner and submit that the error in such statement can be demonstrated by a reference to the opinions of the Fourth and Fifth Circuits in which the scintilla rule has been rejected.

In the Fifth Circuit case of **Martin v. Burgess**, 82 F. 2d 321, 324, the court followed Alabama law in respect to presumptions and burden of proof, as indicated by the following:

> "In Alabama proof that the truck was defendant's raises an administrative presumption that its use was authorized at the time and place of the collision, so as to put the burden of explanation on the defendant; but the presumption is not evidence, and serves only to impose upon the defendant the burden of showing that the driver was not his agent, or, if he was, that he was not acting within the scope of his authority or in the course of his employment, Toranto v. Hattaway, 219 Ala. 520, 122 So. 816; and the proof ought to be clear and convincing, Rooks v. Swift & Co., 210 Ala. 364, 98 So. 16. But when it is shown without contradiction that the defendant's vehicle was used without his authority at the time and place, a verdict against him cannot stand."

After determining that, under Alabama law, the verdict should not stand the Court of Appeals cited the case of **Pennsylvania R. R. Co. v. Chamberlain**, 288 U. S. 333, 341, in support of the conclusion that a verdict should be directed for the defendant.

The foregoing shows that the Fifth Circuit was following the so-called "state test", as was done in the instant case, until it reached the conclusion that the verdict could

not stand. Thereupon, it reverted to a recognition of the rule enunciated in the case of **Schuylkill & D. Improv. Co. v. Munson**, 14 Wall. 442, 448.

In the Fifth Circuit case of **White v. New York Life Ins. Co.**, 145 F. 2d 504, the court followed Alabama law as to the basic question presented, as indicated by the following:

> "As this suit is founded upon an Alabama contract the applicable rule must be determined by Alabama law" (145 F. 2d 507).

In the White case the court, after concluding that, under Alabama law, the plaintiff had not met the burden imposed upon her, observed as follows:

> "In the Federal courts where the evidence in favor of one party is so overwhelming that the judge in the exercise of sound discretion would be obliged to grant a new trial if the jury rendered a verdict in favor of the other party, it is his duty to direct a verdict. The rule of practice to the effect that a mere scintilla of evidence is sufficient to require submission to the jury has never obtained in the Federal courts."

The Court of Appeals at this point cites a number of decisions of this Court, including the following:

Pennsylvania R. Co. v. Chamberlain, 288 U. S. 333;
Gunning v. Cooley, 281 U. S. 90;
Galloway v. United States, 319 U. S. 372;
Slocum v. New York L. Ins. Co., 228 U. S. 364, 369.

In the footnote of the opinion in the White case there is the following quotation from the Slocum case:

> "'When, on the trial of the issues of fact in an action at law before a Federal court and a jury, the evidence, with all the inferences that justifiably could be drawn from it, does not constitute a sufficient basis for a verdict for the plaintiff or the defendant, as the

> case may be, so that such a verdict, if returned, would have to be set aside, the court may and should direct a verdict for the other party'" (145 F. 2d 509).

The decisions of the Fifth Circuit in the Martin and White cases, supra, show that the scintilla rule has not been rejected because it is a "state test," but because it would prevent the judge from discharging his duty to direct a verdict where the conclusion is reached, as a matter of law, that a verdict against the party moving for a directed verdict would not be permitted to stand.

III.

Petitioner, at page 3 of the reply, quotes from the Fifth Circuit case of **N. Y. Life v. Sparkman**, 101 F. 2d 484, 485, and makes it appear that the court declined to follow the law of Florida. It will be observed from a reference to the opinion in the Sparkman case that immediately following the statement quoted in petitioner's reply the court cited the case of **Herron v. Southern Pacific Co.**, 283 U. S. 91, and that immediately following the citation of the Herron case the court observed:

> "But we find no substantial difference between the Federal and state authorities in the statement and application of the rule that where the proof shows a violent death not self-inflicted and no more, there should be a finding of accidental death, but that where, as here, it shows death by violence self-inflicted, it must go further to show that the circumstances of the self-infliction, are, if not inconsistent with the theory of suicide, at least consistent with that of accident" (101 F. 2d 485).

When the opinions of the Fifth Circuit, including the opinion in the instant case, are analyzed, it becomes obvious that the Fifth Circuit does not insist "that the suffi-

ciency of the evidence is determined by a federal rather than a state standard," as stated on page 3 of petitioner's reply.

IV.

Respondent recognizes that it is difficult if not impossible to reconcile all of the decisions of the various courts dealing with any given question involving conflicts of laws, but unless this Court should render a decision that qualifies the opinions in Herron v. Southern Pacific Co., supra, and in **Byrd v. Blue Ridge Cooperative**, 356 U. S. 525, the rule as to the functions and duty of the court, in respect to the questions of law raised by a motion for a directed verdict and by a motion for judgment notwithstanding the verdict will be, and remain, clear and settled for all time.

V.

Petitioner insists "it is not necessary for this Court to decide on a case by case basis whether the federal or state test is the proper test for proof" (page 4 of petitioner's reply), and that this Court should resolve the conflict among the Circuits for guidance of federal courts. Respondent respectfully insists that there is no conflict among the Circuits as to the overriding question sought to be presented by the petitioner and that there is now a uniform rule governing the judicial function and the jury function under the Seventh Amendment of the Constitution.

It will be recalled that in the recent case of **Kissinger v. E. I. Du Pont De Nemours & Company**, 79 S. Ct. 736, the petitioner contended that the Fifth Circuit violated his rights to a jury trial under the Seventh Amendment of the Constitution by reversing the judgment of the District Court of the Northern District of Alabama and in entering a judgment for the appellee, and that this Court

denied certiorari. In the concurring opinion in the Kissinger case, written by the Chief Judge, the following appears:

> "I know that it has become the fashion in some quarters to consider that a trial by jury means a trial by jury alone in which the jury determines not only what the facts are but whether they are sufficient as matter of law to make out a case. This is not yet the rule in the State Courts of Alabama, nor is it the rule in the Federal Courts of that state and this circuit" (259 F. 2d 420).

It is quite natural that every unsuccessful litigant should desire a new trial in lieu of an adverse judgment, but neither state nor federal judges can surrender their functions to the jury without destroying our system of laws.

VI.

In the reply filed in behalf of petitioner the case of **Cone v. West Virginia Paper Co.**, 330 U. S. 212, 215, is cited in support of the contention that it is better practice to remand a case for a new trial than for the appellate court to enter a judgment. Although certain statements in the opinion in the Cone case, if taken out of context, could be relied upon as supporting the practice contended for by petitioner, the decision in that case should be viewed in the light of the fact that the Court was there dealing with the question whether the Court of Appeals, Fourth Circuit, was authorized to direct the entry of a judgment for defendant, where the defendant had moved for a directed verdict without moving for a judgment notwithstanding the verdict, as provided for by Rule 50 (b). In the Cone case this Court stated as follows:

> "In the absence of such a motion (for judgment notwithstanding the verdict) we think the appellate

court was without power to direct the District Court to enter judgment contrary to the one it had permitted to stand" (Supplied) (330 U. S. 218).

When considered in the light of the question presented in the Cone case, the decision therein cannot be interpreted as supporting the argument of petitioner that the Court of Appeals should have remanded the case for a new trial, in lieu of directing the entry of a judgment for the defendant.

VII.

As we understand it, the petitioner, in the reply, is arguing that Federal rules of procedure must yield to the scintilla rule of Alabama. In this connection petitioner refers to **Ragan v. Merchants Transfer & Warehouse Company**, 337 U. S. 530 (Rule 3); **Woods v. Center State Realty Company**, 337 U. S. 535 (Rule 17 b) and **Cohen v. Beneficial Industrial Corp.**, 337 U. S. 451 (Rule 23).

In the Ragan case this Court approved the decision of the Court of Appeals, Tenth Circuit, to the effect that Rule 3 should not be so construed as to permit the prosecution to judgment of an action which under the law of Kansas was barred by the statute of limitations at the time of service of process upon the defendant, in that service of process was an integral part of the Kansas statute of limitations, citing **Guaranty Trust Co. v. York**, 326 U. S. 99.

In the Woods case, it was held that an action could not be brought against a citizen of Mississippi in a Federal court sitting in that state, where, under state law, the doors of the state court had been closed against such action. This Court again followed the rule of the York case.

In **Cohen v. Beneficial Industrial Loan Corp.**, this Court, under the policy of **Guaranty Trust Co. v. York**, held that

a statute of New Jersey, relating to security for counsel fees and expenses as a condition to the maintenance of a stockholder's derivative action should be recognized and given effect in the Federal Courts of New Jersey.

If any of the foregoing cases is susceptible of being interpreted as meaning that Federal rules of procedure must yield to state laws, which respondent doubts, then such cases could be urged with equal force in support of a contention that any or all of the Federal rules of procedure must yield to state laws now in effect and that such rules could be nullified by state laws which might be adopted hereafter.

Of course, it is obvious that none of the cases discussed above deals with the respective functions of judge and jury in the trial of diversity cases in Federal Courts and it seems that petitioner is going far afield in her effort to establish that the scintilla rule prevailing in the state courts of Alabama applies in diversity cases tried in the Federal Court sitting in that state and that Rule 50 (b) must no longer be given effect in the trial of such cases.

VIII.

If this Court should ever hold that the scintilla rule must be recognized in diversity cases tried in the Federal Court sitting in Alabama, such holding would, of necessity, have the effect of declaring that other state rules, now in effect or hereafter adopted, must also prevail.

For example, the present rule recognized in the State Courts of Alabama and providing that counsel have the right to argue the case before the jury, even where the trial court has made known that it will give an affirmative charge with hypothesis, would have to be followed, and the District Court burdened with hearing arguments and instructing the jury on the issues in the case after the

court has determined that a verdict contrary to the instruction to be given would not be permitted to stand. The latter rule is referred to in **Harris v. State**, 215 Ala. 56, 109 So. 291, which, incidentally, is not a criminal case, as the style might indicate.

The foregoing discussion is engaged in for illustrative purposes only, as time would not permit us to discuss other state rules which would have to be recognized and followed in diversity cases to the exclusion of the Federal Rules of Civil Procedure if the position contended for by petitioner should be carried to its logical conclusion.

CONCLUSION.

For the reasons presented hereinabove and in the initial brief of respondent, it is respectfully insisted that the petition should be overruled.

Respectfully submitted,

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Certificate.

I hereby certify that true copies of the foregoing supplemental brief have been served upon Messrs. Truman M. Hobbs and Francis H. Hare, attorneys of record for peti-

tioner, and I further certify that a true copy thereof has been served upon Messrs. Mitchell & Poellnitz, attorneys of record for respondents, Musgrove Insurance Agency, a partnership composed of W. T. Musgrove and W. R. Cadenhead, and W. T. Musgrove and W. R. Cadenhead, individually.

This the ... day of October, 1959.

.....

Reid B. Barnes,
Of Counsel for Respondent, Continental Casualty Company.